

## VU Research Portal

### **An Unique non-State Actor in International Law: The International Committee of the Red Cross**

Gazzini, T.

#### ***published in***

Human Rights and International Legal Discourse  
2010

#### ***document version***

Peer reviewed version

[Link to publication in VU Research Portal](#)

#### ***citation for published version (APA)***

Gazzini, T. (2010). An Unique non-State Actor in International Law: The International Committee of the Red Cross. *Human Rights and International Legal Discourse*, 2010(4), 32-46.

#### **General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

#### **Take down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

#### **E-mail address:**

[vuresearchportal.ub@vu.nl](mailto:vuresearchportal.ub@vu.nl)

This is a postprint of

---

**An Unique non-State Actor in International Law: The International Committee of the Red Cross**

Gazzini, T.

Human Rights and International Legal Discourse, 2010(4), 32-46

---

Published version: no link available

Link VU-DARE: <http://hdl.handle.net/1871/47302>

**(Article begins on next page)**

## **A unique non-State actor: the International Committee of the Red Cross**

**Tarcisio Gazzini \***

### **SUMMARY**

I. Introduction .....	1
II. International legal status of the ICRC .....	3
III. International mandate conferred to the ICRC.....	8
IV. Role of the ICRC in the development of international law .....	11
V. Concluding remarks .....	14

### **I. Introduction**

The essay discusses the *unique* role <sup>1</sup> played by a special non State actor – the International Committee of the Red Cross (hereinafter ICRC) – in the implementation and enforcement of international humanitarian law. It argues that the question of international legal personality may not be as uncontroversial as it is often claimed and that at any rate solving such a question is not absolutely necessary to understand the nature and the role of the ICRC.

From this perspective, the paper attempts to go beyond the rigid approach based on the attribution or non-attribution of international subjectivity in order to explain the performance by the ICRC of functions traditionally reserved to States (Protecting Powers) in terms of a mandate conferred to it by a large number of States through the relevant international treaties.

---

\* Assistant Professor, Faculty of Law, VU University Amsterdam, email [t.gazzini@rechten.vu.nl](mailto:t.gazzini@rechten.vu.nl).

<sup>1</sup> International Criminal Tribunal for Former Yugoslavia, *Prosecutor v Simic et al.*, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para 721. The unique character of the ICRC has been incidentally recognised in the ILC First report on responsibility of international organizations (G. Gaja, Special Rapporteur), A/CN.4/532, 26 March 2003, para 21, <http://daccessdds.un.org/doc/UNDOC/GEN/N03/300/28/PDF/N0330028.pdf?OpenElement>): “the the study should not encompass questions of responsibility of non-governmental organizations, because they do not generally exercise governmental functions (footnote: One may acknowledge the existence of some exceptions, like the International Committee of the Red Cross)”.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

Although established as a private association in accordance with Article 60 ff. of the Swiss Civil Code and composed of fifteen to twenty Swiss citizens<sup>2</sup>, the ICRC performs several functions at the international level and is generally considered as possessing international legal personality.

Under Article 4 of its Statute, the ICRC shall, *inter alia*, undertake the tasks incumbent upon it under the Geneva Conventions, work for the faithful application of international humanitarian law applicable in armed conflicts, take cognizance of any complaints based on alleged breaches of that law, endeavour at all times to ensure the protection of and assistance to military and civilian victims of armed conflicts, ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions.

The 1949 Geneva Conventions, in turn, contain several provisions on the role the ICRC plays in the implementation and enforcement of international law. The ICRC functions include: (a) visiting and interviewing prisoners of war<sup>3</sup> and civilian internees<sup>4</sup>; (b) providing relief to protected civilians, prisoners of war and the population of occupied territories<sup>5</sup>; (c) searching for missing persons and to forward family messages to prisoners of war<sup>6</sup> and civilians<sup>7</sup>; (d) offering its good offices to facilitate the institution of hospital zones<sup>8</sup> and safety zones<sup>9</sup>; (e) receiving applications from protected persons<sup>10</sup>; (f) offering its services in other situations<sup>11</sup> and especially in time of non-international armed conflicts<sup>12</sup>.

---

<sup>2</sup> Article 7 (1) ICRC Statute.

<sup>3</sup> Third Geneva Convention, Article 126

<sup>4</sup> Fourth Geneva Convention, Article 143

<sup>5</sup> Third Geneva Convention, Articles 73 and 125; Fourth Geneva Convention, Articles 59 and 61.

<sup>6</sup> Third Geneva Convention, Article 123

<sup>7</sup> Fourth Geneva Convention, Article 140

<sup>8</sup> First Geneva Convention, Article 23

<sup>9</sup> Fourth Geneva Convention, Article 14

<sup>10</sup> Fourth Geneva Convention, Article 30

<sup>11</sup> Article 9 of Conventions I, II and III ; Article 10 of the Fourth Convention

<sup>12</sup> Common Article 3 to the 1949 Conventions.

## II. International legal status of the ICRC

The Geneva Conventions and their Additional protocols are silent on the legal status of the ICRC and do not impose on contracting parties the obligation to recognize its personality, either internationally or domestically, or to grant it immunities. Article 2 of the Statutes of the ICRC laconically reads: “As an association governed by Article 60 and following of the Swiss Civil Code, the ICRC has legal personality”. The provision clearly concerns the legal status of the ICRC in the national legal system. The ICRC, however, has claimed to be a subject of international law both before the International Criminal Tribunal for former Yugoslavia (hereinafter ICTY) and in internal but public documents<sup>13</sup>.

Given the unique character of the ICRC it is rather surprising that the international legal personality of the ICRC is – with an important exception<sup>14</sup> – universally accepted in literature<sup>15</sup> although it is often qualified as limited<sup>16</sup> or *sui generis*<sup>17</sup>. This is also the position of several governments. In the headquarter agreement with the ICRC, the Swiss

---

<sup>13</sup> That the ICRC possesses *sui generis* international legal personality has been maintained in documents meant for the ICRC delegates. See G. Rona, “The ICRC privilege not to testify: Confidentiality in action”, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList109/C3B5CC5CF93CE974C1256E4E00351893>.

<sup>14</sup> G. Barile, ‘Caractère du Comité International de la Croix Rouge’, *Rivista diritto internazionale* (1979) 111.

<sup>15</sup> J.A. Barberis, ‘El Comité internacional de la Cruz Roja come sujeto del derecho de gentes’, in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (The Hague-Geneva: Nijhoff/ICRC, 1984), p. 635; C. Dominicé, ‘La personnalité juridique internationale du CICR’, *idem*, p. 663; P. Reuter, ‘La personnalité juridique internationale du Comité international de la Croix-Rouge’, *idem*, p. 783; A. Lorite Escorihuela, ‘Le Comité international de la Croix Rouge comme organisation sui generis? Remarques sur la personnalité juridique internationale du CICR’, *RGDIP* (2001) 581; G. Distefano, ‘Le CICR et l’immunité de juridiction en droit international contemporain: fragment d’investigation autour d’une notion centrale de l’organisation internationale’, *RSDIE* (2002) 355; F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Oxford: Macmillan, 2003), p. 954 ff; G. Abraham, ‘Yes, ... but does it have Personality?: The International Committee of the Red Cross and Sovereign Immunity’, 124 *South African Law Journal* (2007) 499.

<sup>16</sup> See, for instance, K. Ipsen, *Völkerrecht*, Munich 1990, § 8, margin No. 4. For A. Lorite Escorihuela, above n. 15, p. 615; and F. Bugnion, above n. 15, p. 955 and p. 963, in particular, the ICRC enjoys “some measure” or “a degree” of international legal personality. Other authors more convincingly argue that international legal personality is indivisible, see, in particular, C. Dominicé, ‘L’accord de siège conclu par le Comité International de la Croix Rouge avec la Suisse’, *RGDIP* (1999) 5, p. 18.

<sup>17</sup> G. Distefano, above n. 15, footnote 18.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

government recognized “the international juridical personality and the legal capacity in Switzerland of the ICRC”<sup>18</sup>. According to the German Government, in turn:

[a]lthough it is an association under Swiss law based in Geneva, it has international legal personality in a number of respects. The ICRC's work in connection with international armed conflicts is based on the four Geneva Conventions of 1949 and Protocol Additional I of 1977, which give it the right to carry out specific activities such as assisting the wounded as well as sick or shipwrecked troops, visiting prisoners of war and providing aid and succour for civilians. In situations of civil war, too, the ICRC is entitled under Article 3 of the Geneva Conventions to offer its services to the warring parties. The basic pre-requisite for its work is strict impartiality and neutrality<sup>19</sup>.

The ICTY has also endorsed this conclusion. In *Prosecutor v Simic*, the Prosecutor and the Trial Chamber agreed that the ICRC possesses international legal personality but took different positions on the consequences of such finding in particular with regard to the disclosure in judicial proceedings of documents related to the work of the ICRC. The former sought to introduce testimony from a former ICRC employee acting on his own initiative but without the consent of the ICRC. The latter opposed the testimony as there was no “overwhelming need to admit such evidence and that this need is strong enough to outweigh the need for confidentiality and the likely adverse effect on the ICRC’s ability to function”<sup>20</sup>.

The Trial Chamber went even further than the ICRC and held that evidence sought by the Prosecutor must not be given as the ICRC enjoys an absolute privilege to withhold information. On the international legal personality of the ICRC, however, the Tribunal took a prudent stand by admitting that the ICRC enjoys a special status in international law<sup>21</sup> and by pointing out in a footnote that “[i]t is generally accepted that the ICRC,

---

<sup>18</sup> Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993, Article 1, available at <http://icrc.org/Web/eng/siteeng0.nsf/html/57JNX7>.

<sup>19</sup> Federal Foreign Office, *International Humanitarian Law*, available at <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/HumanitaeresVoelkerrecht.html>.

<sup>20</sup> Para 19. The Trial Chamber further argued that evidence should be admitted when the following conditions are met: (1) the crimes charged are of the utmost gravity; (2) the evidence must be indispensable, in the sense that the case could not be mounted without it; and (3) admitting the evidence would not prejudice the work of the ICRC.

<sup>21</sup> Para 46.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

although a private organization under Swiss law, has an international legal personality”<sup>22</sup>.

The attribution of international personality to the ICRC is justified primarily on the basis of: (a) the conclusion of several international treaties between the ICRC and States or International organisations, including headquarter agreements with more than 60 States; (b) the enjoyment by the ICRC of immunities from the jurisdiction of several States; (c) the diplomatic relations the ICRC maintains with States and international organizations; (d) the granting to the ICRC of observer status at the United Nations<sup>23</sup>; (e) the claims put forward by the ICRC against subjects of international laws such as the United Nations; (f) the functions exercised by the ICRC<sup>24</sup>.

It is submitted that there are no absolutely compelling arguments for the international legal personality of the ICRC in the traditional sense of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims<sup>25</sup>.

The conclusion of agreements with States or International organisations does not demonstrate the international legal status of the ICRC. The qualification of an agreement as international treaty depends on the legal status of the contracting parties<sup>26</sup>. Yet, the agreements concluded by a States with non-State actors – such as non-governmental organisations or multinational companies – are international in the sense of not being confined to the jurisdiction of any given State but are not strictly speaking international treaties for the purpose of the law of the treaties.

Nor even the fact that some headquarter agreements provide for a mechanism for the solution of disputes similar to international arbitration imposes the qualification of the agreement as international treaty or the attribution of international legal personality to the

---

<sup>22</sup> Footnote 9, relying on the agreement on this point between the Prosecutor and the ICRC as well as on the opinions of Professors Crawford and Salmon. The Eritrea Ethiopia Claims Commission limited itself to acknowledge that the ICRC “has a special interest and responsibility for promoting compliance with the Geneva Conventions, Partial Award, 1 July 2003, Prisoners of War. Ethiopia’s Claim 4, para 25 and Claim 17, para 34.

<sup>23</sup> General Assembly Resolution 45/6 adopted on 16 October 1990.

<sup>24</sup> See, in particular, F. Bugnion, above n. 15, p. 962.

<sup>25</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 174, p. 179.

<sup>26</sup> See the definition of treaty under Article 1 of the Vienna Convention on the Law of Treaties.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

ICRC<sup>27</sup>. As international investment arbitration clearly demonstrates, this classic method for the resolution of international disputes is not necessarily available only to subjects of international law.

The enjoyment of privileges and immunities by the ICRC in different countries is the result of agreements with or legislation of the local governments. Since nothing prevents a State from granting immunities to an organisation or entity without international legal personality, the mere enjoyment of immunities by the ICRC, either on the basis of a piece of legislation or of an agreement with the territorial government, does not amount to conclusive evidence on its possession of international personality.

The recent Swiss legislation on privileges and immunities granted by Switzerland as host State, for instance, applies to organisations, entities and individuals regardless of their international legal status<sup>28</sup>. Significantly, in the message to the Parliament, the government pointed out that

[l]’organisation intergouvernementale dispose toujours de la personnalité juridique internationale, qui lui est conférée par le traité international qui la crée. Tel n’est pas le cas de l’institution internationale qui jouit toutefois d’une place particulière dans les relations internationales. Nous pouvons citer comme exemples des institutions telles que l’Organisation pour la sécurité et la coopération en Europe (OSCE), le Comité international de la Croix-Rouge (CICR) [...] <sup>29</sup>.

---

<sup>27</sup> Article 22 of the headquarter agreement with Switzerland, for instance, reads: “1. Any divergence of opinion concerning the application or interpretation of this agreement which has not been settled by direct negotiations between the parties may be submitted by either party to an arbitral tribunal composed of three members, including the chairman thereof. 2. The Swiss Federal Council and the ICRC shall each appoint one member of the tribunal. 3. The members so appointed shall choose their chairman. 4. In the event of disagreement between the members on the choice of chairman, the chairman shall be chosen, at the request of the members of the tribunal, by the President of the International Court of Justice or, if the latter is unavailable, by the Vice-President, or if he in turn is unavailable, by the longest-serving member of the Court. 5. The tribunal shall be seized of a dispute by either party by petition. 6. The tribunal shall lay down its own procedure. 7. The arbitration award shall be binding on the parties to the dispute”.

<sup>28</sup> Loi fédérale sur les privilèges, les immunités les facilités, ainsi que sur les aides financiers accordées par la Suisse en tant qu’Etat hôte (Loi sur l’Etat hôte, LEH), 22 July 2007, RS 101, available at [http://www.admin.ch/ch/f/gg/pc/documents/1248/Vorlage\\_f.pdf](http://www.admin.ch/ch/f/gg/pc/documents/1248/Vorlage_f.pdf).

<sup>29</sup> Message relatif à la loi fédérale sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu’Etat hôte (Loi sur l’Etat hôte, LEH), 13 September 2006, 06.074, FF 7603, p. 7617, available at <http://www.admin.ch/ch/f/ff/2006/7603.pdf>.



Apart from contradicting Article 1 of the headquarter agreement, the above position confirms that granting immunities to an entity does not presuppose its international legal personality<sup>30</sup>.

Neither the maintenance of relations similar to diplomatic relations nor the granting of observer status at the United Nations, in turn, presuppose the enjoyment of international legal personality<sup>31</sup>.

Practice on claims put forward by the ICRC against subjects of international law is admittedly scarce and can be considered as of limited significance. The most relied upon episode is a claim against the United Nations related to an incident occurred during the crisis in Katanga in 1961. The United Nations paid to the ICRC compensation – without admitting responsibility – following the establishment of a commission of inquiry. Such course of events does not presuppose or demonstrate that the ICRC is a subject of international law.

The most promising question concerning the international legal status of the ICRC concerns the functions performed by the ICRC under the mandate conferred through the Geneva Conventions. It has been argued that the ICRC could not fulfil the mission it has been entrusted unless it possesses international legal personality<sup>32</sup>.

The argument is reminiscent of the reasoning of the International Court of Justice in the *Reparation* advisory opinion<sup>33</sup>. The Court held the United Nations was a subject of international law entitled to bring an international claim since it ‘was intended to exercise and enjoy, and is *in fact* exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measures of international personality and the capacity to operate upon an international plane’<sup>(34)</sup>. The reasoning is to a certain extent circular as the Court “inferred from the specific powers bestowed on the United Nations that it had international personality and then went on to deduce from the existence of such personality that it had the specific power to bring an international claim

---

<sup>30</sup> According to Article 15 of the Swiss Law on host State, above n. 28, immunities may even be granted to personalities exercising an international mandate.

<sup>31</sup> The OSCE provides an excellent example of international organizations deprived of international personality but maintaining intense diplomatic relations with States and other international organizations, and enjoying observer status at the United Nations.

<sup>32</sup> See, in particular, F. Bugnion, above n. 15, p. 962.

<sup>33</sup> *Reparation*, Advisory Opinion, above n. 25.

<sup>34</sup> *Reparation for Injuries*, above n. 33, p. 179 (Italics added).

for one of its officials”<sup>35</sup>. It has nonetheless the merit of emphasizing that international legal personality depends essentially on the concrete performance of functions and enjoyment of rights in international law<sup>36</sup>.

Indeed, the crux of matter when dealing with the international legal status of the ICRC is whether it holds rights and obligations in international law and what kind of functions it performs<sup>37</sup>. Both questions hinge upon the international mandate conferred to the ICRC and deserve to be treated in a separate session.

### III. International mandate conferred to the ICRC

For the purpose of this paper, the activities of the ICRC can be divided into two categories: the humanitarian activities that the ICRC can carry out subject to the specific consent of the Parties to an armed conflict; and the activities the Parties to an armed conflict must allow the ICRC to perform on the basis of international obligations.

The activities belonging to the first category are far less interesting being activities carried out within the territory of a State with its consent freely expressed in respect to a specific armed conflict. The parties to the Geneva Conventions can obviously authorise any organisation to perform such activities regardless to any treaty provisions and to the legal status of the organisation. Significantly, the relevant provisions of the Geneva Conventions refer to the services of the ICRC or “any other impartial humanitarian organisation”<sup>38</sup>.

---

<sup>35</sup> A. Reinisch, *International Organizations Before National Courts* (Cambridge: Cambridge University Press, 2000) p. 55. See also D.W. Bowett, *The Law of International Institutions*, 4<sup>th</sup> ed. (London: Stevens, 1982), p. 337; P. Sands, P. Klein, *Bowett's Law of International Institutions*, 5<sup>th</sup> ed. (London: Sweet and Maxwell, 2001), p. 473; N.D. White, *The Law of International Organisations*, 2<sup>nd</sup> ed. (Manchester: Manchester University Press, 2005, p. 44.

<sup>36</sup> According to G. Gaja, above n. 1, p. 11 ‘[t]he entity [...] needs to have acquired a sufficient independence from its members so that it cannot be regarded as acting as an organ common to the members. When such an independent entity comes into being, one could speak of an “objective international personality”, as the Court did in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*. The characterization of an organization as a subject of international law thus appears as a question of fact’.

<sup>37</sup> The theoretical discussion on whether a subject is a subject because it possesses rights and obligations, or the other way around (as maintained by C. Dominicé, above n. 16, p. 19), goes beyond the purpose of this paper.

<sup>38</sup> Article 9, 9, 9 and 10 of the Geneva Conventions.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

The activities belonging to the second category, on the contrary, are carried out on the basis of international obligations assumed by the contracting parties under the Geneva Conventions or Protocols. The ICRC either replaces the Contracting Power and performs the functions traditionally performed by the latter<sup>39</sup>; or enjoys the same prerogatives of Protecting Powers<sup>40</sup>.

In order to understand the international legal status of the ICRC, therefore, is necessary to examine the role traditionally played by Protecting Powers, an institution which was already well established before the Geneva Conventions<sup>41</sup> but has almost fallen into desuetude since<sup>42</sup>. The Protecting Powers were appointed by the Parties to the conflict and assigned the duty to safeguard the respective interests during the conflict. The appointment of a Protecting Power was “a private matter between the Power of Origin, which appoint[ed], the Protecting Power, which [was] appointed, and the State of residence, in which the functions of the Protecting Power [were] to be exercised”<sup>43</sup>.

Under the Geneva Conventions, the ICRC has received from the contracting parties the mandate to perform the functions traditionally performed by the Protecting Powers when for whatever reasons it is not possible to appoint any Protecting Power.

Furthermore, the ICRC plays a role alongside the Protecting Powers, assuming that they have been designated. Under Article 126 III Geneva Convention and Article 143 IV Geneva Convention, in particular, the ICRC enjoys the same prerogatives of Protecting Powers in respect of the two most important activities of the ICRC, namely visiting and interviewing prisoners of war and civilian internees.

---

<sup>39</sup> Under Articles 10, 10, 10, and 11 of Geneva Conventions I, II, III, and IV, in particular, in the absence of a Protecting Power, the concerned Party to the conflict “shall request of accept [...] the offer of the services of an humanitarian organization, such as the ICRC, to assume the humanitarian functions performed by Protecting Powers”. As admitted by the ICRC itself, these provisions remain incomplete and confused in spite of an obvious effort to carry matters to their logical conclusion (see, Commentary to Article 10, II Geneva Convention).

<sup>40</sup> See, in particular, Article 126, III Geneva Convention and Article 143, IV Geneva Convention.

<sup>41</sup> The institution dates back to the 1870 Franco-Prussian war. The first conventional provisions on Protecting Powers were contained in the 1929 Geneva Convention on the treatment of prisoners of war.

<sup>42</sup> R. Kolb, *Ius in bello. Le droit humanitaire des conflits armés* (Bâle, Genève, Munich: Helbing & Lichtenhahn, 2003), p. 244. M. Sassòli, A. Bouvier, *How Does Law Protect in War?* (Geneva: ICRC, 2<sup>nd</sup> ed., 2006), observes that since World War II, Protecting Powers were designated only in five conflicts.

<sup>43</sup> ICRC Commentary to Article 10, III Geneva Convention.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

The innovation introduced in Articles 126 and 143 has been described in the ICRC Commentary as follows:

The International Committee's delegates had not been able to carry out their activities before except under special agreements concluded in advance with each of the Powers concerned. Now, however, those activities become to some degree automatic. The representatives and delegates of the Protecting Powers and those of the International Committee are henceforth placed on a completely equal footing.

As a matter of fact, the ICRC is not formally appointed as substitute of the Protecting Power but simply performs all of its functions. It has been argued that the ICRC

has no interest to act as a substitute of the Protecting Powers, as it can fulfil most of the latter's functions on its own right, without giving the impression of representing only one State and not all victims. For one of the rare function which international humanitarian law confers only upon the Protecting Powers and not also to the ICRC, that of being notified of and assisting to judicial proceedings against protected persons, the ICRC has managed to be recognized as a *de facto* substitute when there is no Protecting Power<sup>44</sup>.

For all practical purposes, therefore, the ICRC may be considered as performing functions equivalent to those normally performed by Protecting Powers.

However, a remarkable difference still exists. In line with Article 1 common to the four Conventions<sup>45</sup> and Article 1 of Additional Protocol I, the ICRC is not merely protecting the interests of the parties to the conflict but supervising and enforcing the Conventions on behalf all its States parties.

It is submitted that the mandate bestowed to the ICRC neither presupposes the international legal personality of the ICRC nor confers to it any subjective right. Rather, the ICRC is entrusted with ensuring the respect of the obligations incumbent upon the parties to the Conventions. The obligations imposed by the Conventions upon the Parties to the conflict have their counterpart in the corresponding rights of all other States parties.

---

<sup>44</sup> M. Sassòli, A. Bouvier, above n. 42, p. 281.

<sup>45</sup> Under Common Article 1, the contracting parties undertakes "to respect and to ensure respect" for the present Convention in all circumstances. In literature, see L. Condorelli/L. Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des États de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances"', in C. Swinarski (ed.), above n. 15, p. 18.

The only author who has addressed the question concluded by denying the international legal personality of the ICRC. He maintained that

Le C.I.C.R., dans son activité joue très souvent un rôle international. Parfois même, il peut être ramené à la catégorie des organismes que l'on a également appelés organes internationaux de fonctions, dans le sens qu'il exerce par l'imposition d'une volonté commune des Etats, une fonction internationale. Il ne peut cependant être considéré comme sujet international parce qu'il n'est pas en lui-même titulaire de situations juridiques subjective internationales <sup>46</sup>.

This approach better reflects the nature and the legal basis of the functions performed by the ICRC without affecting in any way the effectiveness or undermining the importance of the activities carried out by the ICRC. The ICRC remains a Swiss private association to which the contracting parties of the Geneva Conventions mandated certain functions in relation to the compliance of *their* international obligations and the enjoyment of *their* rights. The activities carried out by the ICRC are clearly relevant from the standpoint of international law and the ICRC may avail itself of institutions which are typical of international law. However, attributing to the ICRC rights and obligations under international law, or recognizing its international legal personality is an unnecessary legal fiction.

When a contracting party denies the ICRC access to a prisoner of war camp, accordingly, it commits a violation of the right of the other party to the conflict or even of all other contracting parties (if the obligation is to be categorised as an obligation *erga omnes*) – not of the ICRC <sup>47</sup>. In the arbitration between Ethiopia and Eritrea, the Claims Commission pointed out that Ethiopia relied on Article 126 III Geneva Convention “in its allegation that Eritrea violated its obligations by refusing the ICRC access to its prisoners of war” <sup>48</sup>.

#### IV. Role of the ICRC in the development of international law

Constructing the role of the ICRC as a mandate also permits to better understand the contribution of the ICRC to the development of international humanitarian law. It has been argued that

---

<sup>46</sup> G. Barile, above n. 15, p. 115.

<sup>47</sup> Similarly, when access to a prisoner of war camp is denied to a Protecting Power, the violation concerns the right of the State of origin, not of the Protecting Power.

<sup>48</sup> Claim 4, above n. 22, para 59.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

“official ICRC statements, in particular appeals and memoranda on respect for international humanitarian law, have been included as relevant practice *because* the ICRC has international legal personality. The practice of the organisation is particularly relevant in that it has received an official mandate from States “to work for the faithful application of international humanitarian law applicable in armed conflicts and [...] to prepare any development thereof”. The view that ICRC practice counts is also adopted by the International Criminal Tribunal for the Former Yugoslavia, which has regarded the organisation’s practice as an important factor in the emergence of customary rules applicable to non-international armed conflicts. In addition, the official reactions which ICRC statements elicit are State practice”<sup>49</sup>.

The United States government expressed concern over this approach as “the Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States”<sup>50</sup>.

The criticism is fully justified. One thing is to say that the ICRC can influence and promote the development of international humanitarian law through all its activities regardless to whether there are based or not on the Geneva Conventions. This is regularly done not only by the ICRC, but also by national and international non-governmental organisations and even by private individuals.

Another thing is maintaining that the activities of the ICRC amount to State practice and as such they contribute to the development of customary international law. If it is accepted that the ICRC is not the holder of any subjective rights or obligations in international law but ensures the respect of the rights and obligations of States on the basis of a mandate, its activities do not contribute *directly* to the modification of these right and obligations.

This is without prejudice to the development of international humanitarian law that the activities of the ICRC may facilitate or trigger. Any development has to be accepted by the generality of States in terms of *usus* and *opinion juris*. In the performance of its mandate the ICRC may take a proactive attitude toward certain provisions contained in humanitarian treaties and even test how far States are prepared to go with regard to their

---

<sup>49</sup> J-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: CUP, 2005), vol. I, p. xxxv (italics added).

<sup>50</sup> Initial response of United States to ICRC study on Customary International Humanitarian Law with Illustrative Comments, 3 November 2006, at <http://www.state.gov/s/l/2006/98860.htm>, para 103.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

interpretation and application. It must nonetheless be stressed that customary international law is created and develops through the State practice.

This is also without prejudice to importance of the studies and documents prepared by the ICRC which most of the time provide a highly qualified interpretation of the relevant humanitarian provisions and assessment of customary international law which are regularly relied upon by national and international tribunals<sup>51</sup> as well as in national manuals<sup>52</sup>. Needless to say, both interpretation and assessment by the ICRC are not legally binding upon States or Tribunals<sup>53</sup>.

In this respect it is interesting to note that the Ethiopia – Eritrea Claim Commission dealt with the alleged violation committed by Eritrea between May 1998 and August 2000, when the Geneva Conventions were not applicable. It held that the obligation to allow the ICRC access to places where prisoners of war were detained existed also under customary international law and that consequently Eritrea was liable vis-à-vis Ethiopia for any breach. With regard to the mandate conferred to the ICRC, it held that

The Commission cannot agree with Eritrea's argument that provisions of the Convention requiring external scrutiny of the treatment of POWs and access to POWs by the ICRC are mere details or simply implementing procedural provisions that have not, in half a century, become part of customary international law. These provisions are an essential part of the regime for protecting POWs that has developed in international practice, as reflected in Geneva Convention III. These requirements are, indeed, "treaty-based" in the sense that they are articulated in the Convention; but, as such, they incorporate past practices that had standing of their own in customary law, and they are of such importance for the prospects of

---

<sup>51</sup> See, for instance, Israel, Supreme Court, *Public Committee against Torture in Israel v. Government of Israel*, 11 December 11 2005, available: [elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf), paras 33 and 34; International Criminal Tribunal former Yugoslavia, Appeal Chamber, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 29 July 2004, especially paras 112 ff. and 185 ff., available at <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>.

<sup>52</sup> See, for instance, United Kingdom Ministry of Defence, *The Manual of Armed Conflict* (Oxford : Oxford University Press, 2005).

<sup>53</sup> With regard to interpretation, in particular, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it", *Question of Jaworzina*, Advisory Opinion, 6 December 1923, Permanent Court of International Justice, Series B, No. 8 (1923), p. 37.

**ILA COMMITTEE ON NON-STATE ACTORS – LEUVEN 26-28 MARCH 2009**  
**PROVISIONAL DRAFT**

compliance with the law that it would be irresponsible for the Commission to consider them inapplicable as customary international law<sup>54</sup>.

Although not supported by adequate evidence on State practice, the finding is interesting for at least two reasons. First, the Claim Commission believes that the provisions on the mandate conferred to the ICRC may develop beyond the conventional framework and become customary international rules binding upon all States. Second, it confirms that the obligation to grant access to prisoner of war camps is owed to other contracting parties and the role of the ICRC is instrumental to the respect of such obligation.

**V. Concluding remarks**

There is no doubt that the ICRC is a unique non-state actor performing a unique role in international law. It remains nonetheless a Swiss private association and attributing international legal personality to it is neither convincing nor necessary.

It is submitted that the status and functions of the ICRC can be better explained in terms of an international mandate. From this perspective, the contracting parties of the Geneva Conventions not only agreed on certain rights and obligations, but also conferred to the ICRC certain functions traditionally performed by the Protecting Powers and directed at ensuring the respect of the Conventions. As a result, the parties to a conflict are legally bound under the treaties to allow the ICRC to perform these functions in their territories.

The case of the ICRC is yet another demonstration that international law needs to liberate itself from the straightjacket created by the dichotomy objects – subjects<sup>55</sup>, and to accept the increasingly significant role played by a variety of actors.

One may finally wonder whether the large successful experience of mandate conferred to the ICRC in the field of humanitarian international law could be exported to other fields of international law.

---

<sup>54</sup> Claim 4, above n. 22, para 61.

<sup>55</sup> See R. Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Clarendon, 1994), p. 54.